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IN THE

Supreme Court of the United States

OCTOBER TERM—1959

No. 713

CHRISTOS VASSOS,

Petitioner,

against

SOCIETÀ TRANS-OCEANICA CANOPUS, S. A., MAR-TRADE CORPORATION and the S.S. CANOPUS, her engines, hull, tackle, cargo and her appurtenances thereof,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JACOB RASSNER,
15 Park Row,
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Proctor for Petitioner.

INDEX

	PAGE
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statement of Facts	2
Reasons for Granting the Writ	3
POINT I—The Court below was in error, in effect, holding that a dismissal of part of a complaint constituted an appealable judgment or order	4
POINT II—The Court below was in error in declaring a dismissal not on the merits as res judicata	5
POINT III—It is axiomatic and requires no argument that a refusal to entertain jurisdiction does not constitute a trial on the merits	6
POINT IV—Any statute of limitation could not begin to run until January 6, 1960, the date of the final judgment herein	11
Conclusion	11
APPENDIX:	
Opinion of the United States Court of Appeals for the Second Circuit	13
Judgment	14

Cases Cited

Buchholz v. United States Fire Ins. Co., 53 N. Y. S. 2d 608, 269 App. Div. 49	10
Cosmopolitan Shipping Company v. McAllister, 337 U. S. 783	4, 7
Erie v. Tompkins, 304 U. S. 64, 58 S. Ct. 817	8

PAGE

Hawn v. Pope & Talbot, 346 U. S. 406, 74 S. Ct. 202 6

Lauritzen v. Larsen, 345 U. S. 571, 73 S. Ct. 921 6

Lowry v. International Brotherhood, etc., 220 F. 2d 546 8

Meade v. Phillips, 27 F. Supp. 801 9

Mehrer v. North Ninth Lumber Co. Inc., 275 App. Div. 1059, 92 N. Y. S. 2d 178 8

People ex rel. Calderazzo, et al. v. Stiner, et al., 271 App. Div. 841, 66 N. Y. S. 2d 48 9

Piasecik v. Trader Navigation Co., 2 Cir., 178 F. 2d 886 ..... 2, 5

Schnerb v. Caterpillar Tractor Co., 24 F. 2d 377 (C. C. A. 2d 1928) 10

Shaw v. United States Fidelity & Guaranty Co., 101 F. 2d 92 10

Taylor v. Atlantic Maritime Company, 2 Cir. 179 F. 2d 597 4

Western Electric Co. v. Pacent Reproducer Corporation, 37 F. 2d 14 ..... 2, 5

Statutes Cited

New York Civil Practice Act, Section 23 ....2, 3, 6, 8, 9, 10

Rule 60(b), Federal Rules of Civil Procedure 2, 5, 11

Rule 60(b), subd. (5), Federal Rules of Civil Procedure 6

28 U. S. C. A. 1254(1) 2

28 U. S. C. A. 1265(1) 2

46 U. S. C. A. 688 (Jones Act) 2, 5

IN THE

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No:

CHRISTOS VASSOS,

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SOCIETA TRANS-OCEANIC CANOPUS, S. A., MAR-TRADE CORPORATION and the S.S. CANOPUS, her engines, hull, tackle, cargo and her appurtenances thereof,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on November 19, 1959.

Opinion Below

The opinion of the United States Court of Appeals decided November 19, 1959 is reported in 272 Fed. 2nd 182 (Appendix, p. 13).

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on November 19, 1959.

The jurisdiction of this Court is invoked under Title 28 U. S. C. A. Section 1254(1).

Questions Presented

Whether or not Rule 60(b) of the Federal Rules of Civil Procedure has been correctly interpreted.

Is the computation of the one year limitation within which to reopen a judgment in a civil action completely controlled by the Federal Rule of Civil Procedure 60(b), as held by the Court below, where but some of the causes of action in the complaint have been dismissed, or is the time tolled until there has been a final determination of the remaining cause of action, as held by the Court below in the cases of *Western Electric Co.* v. *Pacent Reproducer Corporation*, 37 F. 2d 14, and *Piascik* v. *Trader Navigation Co.*, 2 Cir., 178 F. 2d 886?

Is a summary judgment predicated on the fact that a litigant has filed an action under the Jones Act, 46 U. S. C. A. 688, *res adjudicata* so as to bar subsequent action by way of a libel predicated on general maritime law?

Are the provisions of Section 23 of the New York Civil Practice Act nullified by the provisions of Rule 60(b) of the Federal Rules of Civil Procedure?

Statement of Facts

Libelant, Christos Vassos, an alien seaman, filed a libel on August 11, 1955 to recover damages sustained by said libelant on May 15, 1949. Libelant was employed as an Assistant Steward on the S.S. Canopus, a vessel of Panamanian registry. That as a result of said employment

he contracted tuberculosis. That libelant brought this action against the named respondent and also included in said action a libel in rem against the vessel S.S. CANOPUS. The respondents excepted to the libel and said exceptions were sustained in an opinion by Judge Bicks, 143 F. Supp. 945, and a judgment entered. In an appeal to the Court of Appeals, the judgment of the lower Court was affirmed. This appeal is taken from said affirmance.

Reasons for Granting the Writ

The Court below has rendered a decision which fixes a one year limitation of time within which to seek relief from a judgment dismissing some causes of action in a complaint where the entire controversy has not been terminated, which is in conflict with this Court's previous decisions holding that an appeal cannot be taken before there is a final determination.

The Court below has rendered a decision which, in effect, nullifies the provisions of Section 23 of the New York Civil Practice Act.

The Court below has rendered a decision which, in effect, completely destroys a substantial remedy available to litigants in a State Court, denied to him if he invokes the jurisdiction of a Federal Court.

There has been a complete and radical departure from the uniform holdings by this Court that litigants should be granted an opportunity to have their cases tried on the merits and not summarily disposed of without trial and on strictly technical grounds.

POINT I

The Court below was in error, in effect, holding that a dismissal of part of a complaint constituted an appealable judgment or order.[1]

On the 6th day of January, 1960 a final judgment was entered in favor of Christos Vassos on his remaining cause of action for maintenance and cure.

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[1] Honorable David N. Edelstein's decision did not by its very language constitute final determination of the action.

Vassos v. Mar-Trade USDC—SDNY

EDELSTEIN, *J.*

Law Journal, December 30, 1954

Civ. 75-250

December 28th, 1954.

This motion is, I assume, under Rule 12(b)(6) and since affidavits were submitted and considered, it must be treated as one for summary judgment. The motion will be granted for judgment dismissing the first and third causes of action against the defendant Soc. Trans. Oceanica Canopus S.A. on the ground that they are barred by the statute of limitations. No authority has been submitted for the proposition that the statute was tolled because the defendant was out of the jurisdiction, nor do I know of any. Indeed, it does not even appear that the defendant was unavailable for service. Nor have any facts been presented to indicate that service on the defendant Mar-Trade was equivalent to service on Trans-Oceanica. Moreover, insofar as the first and third causes of action may be based on the maritime law of unseaworthiness, the affidavit submitted on behalf of the plaintiff presents no facts which would warrant the exercise of discretion to entertain jurisdiction in this court of an action between aliens. See *Taylor* v. *Atlantic Maritime Co.* (2 Cir.), 179 F. 2d 597, 598. The motion will be granted for judgment dismissing the fourth cause of action against Trans-Oceanica on the ground of the failure to state a claim upon which relief can be granted. And the motion will be granted for judgment dismissing the complaint against the defendant Mar-Trade Corporation, on the basis of *Cosmopolitan Shipping Co.* v. *McAllister*, 337 U. S. 783. Aside from a mere conclusory allegation on information and belief, nothing appears to warrant the conclusion that Mar-Trade was anything other than a shore-side agent of the defendant Trans-Oceanica, as indeed, is alleged in the complaint.

DAVID N. EDELSTEIN.

We submit that all prior decisions in this matter constitute intermediary decisions or judgments and that petitioner should not have been barred from any relief available to him on the basis of any statute of limitations, including the provisions of Rule 60(b) of the Federal Rules of Civil Procedure, as held by the Court below in *Western Electric Co. v. Pacent Reproducer Corporation, supra*, wherein Circuit Judge Swan, writing for the Court, states at page 15:

> "(2) It is impossible to consider this order as immediately making a final disposition of the case. Even though the words used are 'Bill dismissed,' a condition, though not in form a condition, is attached thereto. 'With leave to amend' in substance means 'unless the complainants amend'. Clearly the case remains pending in the District Court during the period within which amendment is permitted; and if the plaintiff shall file his amendment within that period, then the case, without further action by the court, will remain pending indefinitely. That a party by his own act may fix the character of the decree—that is, make it final or not, without further action by the court—would seem anomalous, to say the least. We think the order is no more than an order sustaining defendants' motion to dismiss, unless an amendment shall be made, and contemplates and requires another order of absolute dismissal after expiration of the time allowed for amendment, if none has been filed."

See also:

Piascik v. Trader Navigation Co., supra.

POINT II

The Court below was in error in declaring a dismissal not on the merits as *res judicata*.

The causes of action which were dismissed were predicated on statutory provisions of the laws of the State of New York. *Jones Act, supra.*

In view of the decision by this Court in the case of *Lauritzen v. Larsen*, 345 U. S. 571, 73 S. Ct. 921, petitioner had no such cause of action, and therefore the dismissal by Judge Edelstein did not constitute a dismissal on the merits.

The petitioner's subsequent cause of action predicated on general maritime law came squarely within the provisions of Section 23 of the New York Civil Practice Act.

Rule 60(b), subd. (5) of the Federal Rules of Civil Procedure specifically states that equitable principles must be considered in determining whether a judgment should have prospective application.

This Court has repeatedly stated, as held in *Hawn v. Pope & Talbot*, 346 U. S. 406, 74 S. Ct. 202, that actions should be determined on the merits and not by reason of fortuitous circumstances.

POINT III

It is axiomatic and requires no argument that a refusal to entertain jurisdiction does not constitute a trial on the merits.

The prior action was dismissed not on the merits, as is self evident by the decision of Judge Edelstein and further explained in more detail by allegations "Sixteenth" and "Seventeenth" of the libel.[2]

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[2] "SIXTEENTH: That on the 7th day of May, 1952, libelant filed a complaint against the Mar-Trade Corporation, which was served on the following day. That settlement negotiations continued until on or about the 1st day of October, 1952, at which time the Mar-Trade Corporation served its answer. That on or about the 18th day of November, 1952, libelant, by his then attorney, sought an order permitting the addition of Societa Trans-Oceanica Canopus S.A. as a party defendant and for an order substituting said corporation in

[Continued on page 7]

Petitioner instituted an action within the one year period as provided by Section 23 of the Civil Practice Act of the State of New York.

[Continued from page 6]

place and stead of Mar-Trade Corporation but upon the argument, the motion was granted as modified permitting the addition of Societa Trans-Oceanica Canopus S.A. as a supplemental party defendant. That an amended complaint was filed on January 20, 1953, and a supplemental summons and amended complaint served on defendants on January 21, 1953. That the subject matter of the complaint was predicated on the Jones Act and the provisions thereof as distinguished from the present action which is in no wise predicated upon the Jones Act or any of its provisions. That no action was ever filed against the respondent, S.S. Canopus. The action against Societa Trans-Oceanica Canopus S.A. having been predicated on the provisions of the Jones Act, which has a three year statute of limitations, and which action was not commenced within the three years was dismissed by Honorable David N. Edelstein on the 28th day of December, 1954. The action against the Mar-Trade Corporation, which was sued in the capacity of a general agent and not by reason of its own personal tort, was likewise dismissed on the same date by the same court on the authority of *Cosmopolitan Shipping Co.* v. *McAllister*, 337 U. S. 783. Neither action had been predicated on unseaworthiness and the respondent, Mar-Trade Corporation, had never been sued for its personal tort as in the case at bar. That by reason of the foregoing, the libelant has been prevented from having his day in court on the merits as the proceedings had on his behalf had been brought under an erroneous concept of the law.

SEVENTEENTH: That by reason of the allegations set forth in the previous paragraph, the libelant was under the impression that his rights were being fully and adequately protected and that he has been guilty of no deliberate delay or laches. That the respondents and their insurance carriers have been on notice of the fact that the libelant was seeking to hold the respondents herein accountable on damages for the accident which is the subject matter of this action since the institution of the original complaint in the civil action aforementioned. That by reason of the service of the summons in the civil action as aforesaid on May 7, 1952, the respondents and each of them have been in a position to, and upon information and belief, have taken all the necessary steps to protect their rights and have in no wise been prejudiced by the delay in starting the above entitled action up to and including the present time."

Section 23 is the legal authority for petitioner instituting an action within one year after the termination of his prior action.

Section 23 of the Civil Practice Act provides as follows:

> "§ 23. *Effect of reversal of judgment or termination of action.* If an action is commenced within the time limited therefor, and a judgment therein is reversed on appeal without awarding a new trial, or the action is terminated in any other manner than by a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or, if he dies and the cause of action survives, his representative, may commence a new action for the same cause after the expiration of the time so limited and within one year after such a reversal or termination. This section also applies to the workmen's compensation law."

Federal law recognizes that a litigant is entitled to the protection of law as provided by said section.

See:

Lowry v. *International Brotherhood, etc.*, 220 F. 2d 546.

See also:

Erie v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817.

The authority for a personal injury or death claimant to institute an action within one year after the termination of a prior action under similar circumstances to that wherein appellant's prior action was terminated, is clearly demonstrated by the following decisions.

Mehrer v. *North Ninth Lumber Co. Inc.*, 275 App. Div. 1059, 92 N. Y. S. 2d 178.

In that case an action for wrongful death was commenced by a widow as administratrix. Actually, she had

not been appointed administratrix until a date subsequent to the commencement of the action. Thereafter, a new action was commenced and a motion to dismiss was made by the defendant on the ground that the second action was barred by the statute of limitations. The Court held that the action was timely commenced under the provisions of Section 23 of the Civil Practice Act.

Similarly, in *People ex rel. Calderazzo, et al.* v. *Stiner, et al.*, 271 App. Div. 841, 66 N. Y. S. 2d 48, where a proceeding was dismissed on the ground that it was defective by reason of the failure to include a necessary party defendant in a proceeding to review assessments on real property, the Court permitted the institution of new proceedings within a period of one year from the final determination.

A decision by Judge Conger of the United States District Court for the Southern District of New York in *Meade* v. *Phillips*, 27 F. Supp. 801, is more precisely in point. In that case, the plaintiff in an action for personal injuries, had recovered in the Municipal Court in the Borough of Manhattan. At the time of the defendant's motion to set aside the verdict, plaintiff's counsel, fearful of the running of the statute of limitations, instituted an action in the Federal Court, inasmuch as, if the dismissal of the action for failure of proof had been granted, plaintiff would be without a remedy.

In line with accepted principles, the Court held that the two actions might be so maintained. However, the Court held that the complaint must be dismissed, inasmuch as if the State Appellate Court dismissed the action for failure of proof, the plaintiff would not be harmed in any way for she would have the right to start another action within one year. Of course, if the appeal were denied, the action in the Federal Court would abate.

Therefore, it is clear that a dismissal for failure of proof, if there is deemed to have been one such in the instant proceedings, would not bar the present action.

Petitioner's position, therefore, is even more strongly buttressed inasmuch as it is claimed that there was not even a dismissal for failure of proof in the prior action and that there was not even a consideration of proof.

A fortiori, petitioner may maintain the present action.

The leading case, frequently cited, is *Buchholz* v. *United States Fire Ins. Co.*, 53 N. Y. S. 2d 608, 269 App. Div. 49. In that case, the Court was presented with a situation where a dismissal of an action upon an insurance policy had been affirmed because of a failure to comply with an essential condition precedent. Subsequent to the decision by the Court of Appeals and within one year thereafter, a new action was commenced after tender of performance of the condition precedent. There was no question in that case but that the performance of the condition precedent was a material and essential part of the cause of action.

The Court construed Section 23 of the Civil Practice Act and held that the Act applied. The Court stated on page 610:

> "Here the termination was the decision of the Court of Appeals (or entry of judgment on remittitur) in the earlier action." Citing cases.

As in the instant case, the commencement of the statutory period was the decision of the final Court of Appeals. Furthermore, the Court held that the prior judgment, although final and conclusive on the existing facts, would not estop a subsequent suit brought after the plaintiff tendered performance of the requirement for appraisal.

See also:

Shaw v. *United States Fidelity & Guaranty Co.*, 101 F. 2d 92;

Schnerb v. *Caterpillar Tractor Co.*, 24 F. 2d 377 (C. C. A. 2d 1928).

POINT IV

Any statute of limitation could not begin to run until January 6, 1960, the date of the final judgment herein.

It will be noted that the action of petitioner for maintenance and cure was one of the causes of action alleged in the original complaint.

That cause of action was not determined until January 6, 1960, at which time the final judgment was entered herein, and for that reason no statute of limitation began to run, even under Rule 60(b) of the Federal Rules of Civil Procedure.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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New York 38, N. Y.,
Proctor for Petitioner.

APPENDIX

(Opinion of the United States Court of Appeals for the Second Circuit)

Before CLARK, Chief Judge, and HINCKS and WATERMAN, Circuit Judges.

PER CURIAM.

Libelant, an alien seaman, seeks redress for personal injuries allegedly sustained on May 15, 1949, while aboard the S.S. Canopus, a vessel of Panamanian registry. In a reasoned opinion, D.C. S.D.N.Y., 143 F. Supp. 945, Judge Bicks sustained exceptions to the libel because of a previous decision in 1954 by Judge Edelstein in a civil action between the parties as well as in the exercise of independent discretion to decline to accept jurisdiction in this suit between aliens.

[1, 2] Judge Edelstein's dismissal of the civil action was based both upon the statute of limitations and upon a refusal to accept jurisdiction. No appeal was taken from it. Citing N. Y. Civil Practice Act, § 23, appellant tries here to reopen the question of jurisdiction and assert a new theory of liability. But the claim is now completely *res judicata* on jurisdictional as well as substantive issues. Stoll v. Gottlieb, 305 U. S. 165, 170, 171, 59 S. Ct. 134, 83 L. Ed. 104; Angel v. Bullington, 330 U. S. 183, 190, 67 S. Ct. 657, 91 L. Ed. 832; Koziol v. The Fylgia, 2 Cir., 230 F. 2d 651, certiorari denied 352 U. S. 827, 77 S. Ct. 40, 1 L. Ed. 2d 49. And any attempt to reopen a judgment in a civil action is completely controlled by F. R. Civ. P. 60(b), not by state statute.

Judgment affirmed.

(Judgment)

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the nineteenth day of November, one thousand nine and fifty-nine.

Present:

HON. CHARLES E. CLARK,
Chief Judge,

" CARROLL C. HINCKS,

" STERRY R. WATERMAN,
Circuit Judges.

CHRISTOS VASSOS,
Libelant-Appellant,

—v.—

SOCIETA TRANS-OCEANICA CANOPUS, S.A., MAR-TRADE CORPORATION and the S.S. CANOPUS, her engines, hull, tackle, cargo and her appurtenances thereof,
Respondents-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the Judgment of said District Court be and it hereby is affirmed; with costs to the appellees.

A. DANIEL FUSARO,
Clerk.

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vs.

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Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Question Presented	2
Statement	2
The Facts	3
Reason for Denying the Writ	6
Conclusion	11

CASES CITED

Angel v. Bullington, 330 U. S. 183	9
Baltimore S. S. Co. v. Phillips, 274 U. S. 316	8
Cohen v. Beneficial Industrial Loan Corp., 337 U. S. 541	10, 11
Cold Metal Process Co. v. United Engineering & Foundry Co., 351 U. S. 445	10
Commissioner of Internal Revenue v. Sunnen, 333 U. S. 591	7
Heiser v. Woodruff, 327 U. S. 726	7

PAGE

McAllister v. Magnolia Petroleum Co., 357 U. S. 221 8

Piasecik v. Trafler Navigation Co., 178 F. 2d 886 10

Reeves v. Beardall, 316 U. S. 283 10

Sears Roebuck & Co. v. Mackey, 351 U. S. 427 10

Stoll v. Gottlieb, 302 U. S. 165 9

Swift & Co. v. Compania Columbiana, 339 U. S. 684 11

United States v. Munsingwear, 340 U. S. 36 7

Western Electric Co. v. Pacent Reproducer Corporation, 37 F. 2d 14 10

STATUTES CITED

Jones Act (46 U. S. C. 688) 3, 4, 8

Federal Rules of Civil Procedure 8, 9

New York Civil Practice Act, Section 23 10

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Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Opinions Below

The opinion of the United States District Court for the Southern District of New York is officially reported in 143 F. Supp. 945. The opinion of The United States Court of Appeals for the Second Circuit is officially reported in 272 F. 2nd 182.

Jurisdiction

It is not disputed that there is jurisdiction under Title 28 U. S. C., Section 1254 (1). However, the petition fails to specify any important reasons why in this case, under

the existing facts, a writ should be granted, nor does it indicate that any genuine reason for the granting of a writ, as set forth in Rule 19 of the Revised Rules of this Court, exists in this case.

Question Presented

Under all the material facts, the basic question presented is whether the Court of Appeals was correct in affirming a dismissal of a libel in admiralty which petitioner instituted after a civil action for the same relief and involving the same parties had been dismissed by a court of competent jurisdiction and petitioner had failed to appeal from the prior adjudication.

Statement

This suit concerns a belated attempt by the petitioner to avoid a prior adjudication of a question of jurisdiction involving the parties hereto and a determination that petitioner's claim for redress for bodily injuries was barred by the applicable statute of limitations. Instead of taking an appeal from the prior adjudication, petitioner permitted the time therefor to expire. Then some eight months later, and after more than six years had expired from the date on which the events which gave rise to petitioner's claim for redress had occurred, petitioner sought to revive the claims which had been previously dismissed by merely commencing a new and separate action thereon in admiralty. Petitioner sought to justify this second, separate and independent action for the same causes by contending that it was unrelated to the first because the theory on which it was predicated was different than that on which he proceeded in his initial action.

These contentions were rejected by the District Court as a basis for an independent action seeking redress for the same wrong previously adjudicated. The second action was thereupon dismissed and this dismissal was affirmed by the Court of Appeals.

In his petition, the petitioner for all intents and purposes has abandoned his previous contentions. Instead, he now seeks to make it appear that the second separate action was merely a step in the initial proceeding and that the court below was therefore in error because it did not so consider it, even though petitioner did not so contend below.

As appears from the statement of facts set forth herein below, the petition is not a true guide to the proceedings in this matter and furnishes no basis for review by this court.

The Facts

Petitioner, an alien seaman, initially commenced a civil action in the United States District Court for the Southern District of New York against the respondent Mar-Trade Corporation seeking redress for bodily injuries which he claimed he sustained on May 15, 1949 while employed aboard the S S *Canopus*, a vessel of Panamanian registry. In the complaint it was alleged that Mar-Trade Corporation owned and operated the S S *Canopus* and that the action was based on the Jones Act (46 U. S. C. 688).

Thereafter by leave of court petitioner filed an amended complaint adding the respondent Societa Trans-Oceanica Canopus, S. A. as a party defendant. This amended complaint was served on the respondents on January 21, 1953 or more than three years and nine months after the causes of action had accrued. The complaint alleged in

substance that the S S *Canopus* was owned and operated by the respondent Societa Trans-Oceanica Canopus, S. A., that the respondent Mar-Trade was a shoreside agent, that the petitioner was injured "wholly and solely by reason of the dangerous, defective and unseaworthy condition of the vessel and the negligence of the defendants, their officers, agents, crew or employees in improperly storing the ship's supplies and otherwise * * * ", and also that by virtue of the Jones Act plaintiff was entitled to recover damages for the negligence of the defendants and of their co-employees in their service on said vessel.

On December 28, 1954 on application of the respondents, the District Court granted judgment to respondents, dismissing the complaint with respect to Mar-Trade Corporation *in toto*, and with respect to Societa Trans-Oceanica Canopus S. A, dismissing all causes of action except that for maintenance and cure. In addition it held that insofar as the cause of action against Societa Trans-Oceanica Canopus, S. A. "may be based on the maritime law of unseaworthiness, the affidavit submitted on behalf of the plaintiff presented no facts which would warrant the exercise of discretion to entertain jurisdiction in this court of an action between aliens."

For some eight months thereafter, petitioner took no action in that suit. No proceeding of any nature whatsoever either in the nature of a motion, an appeal or otherwise, was attempted by petitioner with respect to this adverse adjudication. Instead on August 11, 1955, or when more than six years had elapsed after the occurrence of the events which gave rise to the alleged claim for bodily injuries, petitioner instituted a new and separate action in admiralty. In the libel an attempt was made to avoid the effect of the prior adjudication by urging that, though the claim was for the same bodily injury and was

bottomed on negligence and unseaworthiness, as in the previous action, this action was different because the theory of liability being therein urged was different.

On application of the respondents, the District Court (Judge Bicks) dismissed the libel. In rejecting petitioner's contention that the law did not allow him to conduct his litigation in such piecemeal fashion, and that in any event his remedy was by appeal and not by a new action, it said (143 F. Supp. 945, 946):

> "... an injured seaman suffers but one actionable wrong and is entitled to but one recovery whether his injury is due to the unseaworthiness of the vessel, the negligence of the owner as defined by the General Maritime Law, the negligence of the officers, or the crew, as defined by the Jones Act, or by a combination of some or all of such causes. In either view, there would be but a single wrongful invasion of a single primary right of the plaintiff, namely, the right of bodily safety, whether the acts constituting such invasion were one or many, simple or complex.' Baltimore S. S. Co. v. Phillips, 1927, 274 U. S. 316, 321, 47 S. Ct. 600, 602, 71 L. Ed. 1069. The libelant was bound to set forth in his first suit every ground of recovery which he claimed to exist and upon which he relied, and cannot be permitted, as was attempted here, to rely upon the piecemeal in successive actions to recover for the same wrong and injury." Id., 274 U. S. at page 322, 47 S. Ct. at page 603.

> "As already indicated one of my distinguished colleagues, in the exercise of discretion, declined to entertain jurisdiction of the action against Trans-Oceanica based on unseaworthiness. That order, though appealable, was never brought up for review. While comity persuades but does not com-

mand, Mast, Foos & Co. v. Stover Mfg. Co., 1900, 177 U. S. 485, 488, 20 S. Ct. 708, 44 L. Ed. 856, and there is no imperative duty to follow the earlier ruling, Dictograph Products Co. v. Sonotone Corp., 2 Cir., 1956, 230 F. 2d 131, 135, a defeated suitor should pursue his remedy by appeal and not shop about in the hope of finding a Judge favorably disposed to his view. Libelant has presented no controlling facts which were not before Judge Edelstein. For the foregoing reasons and in the exercise of its independent discretion, the court declines to accept jurisdiction of the controversy between libelant and Trans Oceanica.".

Petitioner thereupon appealed and the Court of Appeals affirmed the judgment of the District Court (App. Petition p. 43).

Reason for Denying the Writ

(1) The decision below is clearly correct. It does not deprive a litigant of the right to challenge a prior adjudication because he may not agree with it. All that it does is prevent the petitioner from relitigating the same issues over and over again in separate and independent actions in the hope of obtaining a more favorable result. Petitioner could have had a review by appeal or even by motion in the same court, however he failed to avail himself of these remedies. Instead he now seeks to have this Court void the effects of such failure. He now attempts to claim for the first time, in this court, that an entry of judgment for maintenance and cure in petitioner's favor extended not only his time to appeal from the prior adjudication but also that it conferred a right on him to relitigate in a new action the issues adjudicated in that prior, separate and independent action.

Apart from the fact that the count for maintenance and cure was a separate count from those that had been adjudicated previously and was tried as such, and a separate judgment entered thereon, the question of appealability is now moot in any event because even the time to appeal from that judgment has also expired and no appeal has been taken. Petitioner thus cannot save himself by claiming that when he commenced the second action, his time to appeal had not expired and the second action was therefore proper. As has been pointed out by this court in *United States v. Munsingwear*, 340 U. S. 36, 39, a judgment in the first suit is binding in any subsequent actions, if an appeal, though available, has not been taken or perfected. There is, certainly, no right to relitigate the issues in an independent action. An issue which has been litigated and decided in the court where the judgment was rendered may not be relitigated anew in another court. *Hyde v. Woodruff*, 327 U. S. 726. Even when the principle of *res judicata* is applied narrowly, an adjudication in a prior action nonetheless operates as an estoppel on those matters which were put in issue and a determination made. As this court pointed out in *Commissioner of Internal Revenue v. Sunnen*, 333 U. S. 591, 598:

> "Once a party has fought out a matter in litigation with the other party, he cannot later review that duel. In this sense, res judicata is usually and more accurately referred to as estoppel by judgment or collateral estoppel." . . .

Accordingly, petitioner's second independent action was improper and the holding by the Court of Appeals that the prior adjudication was *res judicata*, was correct.

(2) Petitioner's contention that the decision below deprives him of a substantial right and is contrary to previous decisions of this court, as well as those of the court below, is incorrect. In *Baltimore S. S. Co. v. Phillips*,

274 U. S. 316, 325 this Court expressly held that a new theory of liability would not support a subsequent action for the same wrong. This principle was reaffirmed in *McAllister* v. *Magnolia Petroleum Co.*, 357 U. S. 221 when this Court said at pages 224-225:

> "* * *. But if the seaman is to sue for both unseaworthiness and Jones Act negligence, he must do so in a single proceeding. That is a consequence of this court's decision in Baltimore S. S. Co. v. Phillips, 274 U. S. 316, 71 L. ed. 1069, 47 S. Ct. 600, which held that these claims were but alternative 'grounds' of recovery for a single cause of action. * * *."

Thus when the Court of Appeals affirmed the District Court's holding that petitioner could not bring successive actions for the same wrong and injury, it was following the rule laid down by this Court and it created no basis for review by this Court in this action. If other, earlier, discussions of the Court Below are in conflict with this principle, they are not the prevailing law. It is not the function of this Court to review a case correctly decided for the purpose of correcting such conflicts.

(3) Under the facts of this case, there is no misinterpretation of the Federal Rules of Civil Procedure. In the first action petitioner litigated the question of whether his action under the Jones Act (46 U. S. C. A. 688) was timely and whether, insofar as the action under the general maritime law was concerned, there were facts which warranted the exercise by the court of its discretion to entertain or to decline jurisdiction of an action between two aliens. Having adjudicated those issues, they could not be inquired into in the subsequent action.

As this Court pointed out in *Stoll v. Gottlieb*, 305 U. S. 165, 172,

> . . . . After a Federal Court has decided the question of the jurisdiction over the parties *as a contested issue*, the court in which the plea of res judicata is made has not the power to inquire again into that jurisdictional fact. . . . " (Emphasis supplied.)

Such an adjudication is on the merits and is binding even though the ultimate substantive issues are not reached. In *Angel v. Bullington*, 330 U. S. 183, this Court stated in this connection at page 190:

> . . . . It is a misconception of res judicata to assume that the doctrine does not come into operation if a Court has not passed on the 'merits' in the sense of the ultimate substantive issues of a litigation. An adjudication declining to reach such ultimate substantive issues may bar a second attempt to reach them in another court of the State. . . . .

Thus petitioner can not avoid the prior adjudication by instituting an independent action in which the same matters would again be brought into issue.

Since Rule 60(b) of the Federal Rules of Civil Procedure prescribes the procedure for reopening a judgment in a civil action, and an independent action in admiralty in total disregard of the prior adjudication such as petitioner attempted here is not permitted by that Rule, there was no misinterpretation of Rule 60(b) by the Court below.

It is fundamental that rules governing procedure in State Courts have no application to procedure in Fed-

eral Courts. In any event Section 23 of the New York Civil Practice Act does not authorize an independent suit for purposes of avoiding a prior adjudication on the merits.

(4) The decisions of the Court below in *Western Electric Co.* v. *Pacent Reproducer Corporation*, 37 F. 2d 14, and *Piasecik* v. *Trader Navigation Co.*, 178 F. 2d 886 are not in conflict with the decision below and furnish no basis for any different result in this matter. In the *Western Electric* case, the order of dismissal which had been entered was held not to be final because it had a condition attached thereto. The condition, "With leave to amend" required a further order of the court after the time allowed for amendment had expired in order to finally dispose of the claim. In the present action the dismissal left nothing further to be done, and was therefore final. *Reeves* v. *Beardall*, 316 U. S. 283; *Sears Roebuck & Co.* v. *Mackey*, 351 U. S. 427; *Cold Metal Process Co.* v. *United Engineering & Foundry Co.*, 351 U. S. 445.

It is also obvious that the decision in *Piasecik* v. *Trader Navigation Co.*, 178 F. 2d 886 has no application to the facts of this case. In the *Piasecik* case there was a dismissal as to one of the defendants who was jointly charged and the count which remained outstanding was inseparable from the one which had been dismissed. It therefore differs from the present action because as this Court said in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 546, the initial dismissal was "nothing more than a step towards final judgment." In *Piasecik* a disposition of the other claim was necessary before the appellate court would have anything to adjudicate. In the present action, the prior adjudication disposed of matters which were not related to or in any way dependent on the disposition to be made in the claim for maintenance and cure. The prior judgment was in all respects final and appealable. *Cohen*

v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 546-547; *Swift & Co.* v. *Compañía Colombiana*, 339 U. S. 684. However, as has been pointed out in subdivision (4), any question based on appealability is now moot in any event.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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